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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 John Kristoffer Larsgard,

10 Plaintiff,

11 v.

12 David Straub, et al.,

13 Defendants.
14

No. CV-13-00638-TUC-DCB

ORDER

15 This case proceeds to trial on the Second Amended Complaint, Count One,
16 Plaintiff's Sixth Amendment claims against Defendant Straub related to Larsgard's
17 confinement in the Mental Health Unit in December 2012 and against Defendant Ryan in
18 his official capacity related to Larsgard's 2013 hospitalizations outside of Arizona
19 Department of Correction (ADC) facilities. Plaintiff seeks compensatory and punitive
20 damages and injunctive/declaratory relief.¹

21 Plaintiff alleges that during one week in 2012 he was confined in ASPC-Tucson,
22 Rincon Mental Health Unit, and Straub, the CO III in charge, refused to allow him to call
23 his attorney unless he could produce documentation to show that the call was necessary
24 and during this week, Larsgard was not allowed any legal documents. The Court found a
25 question of fact exists: whether Straub denied Larsgard any means to communicate with
26 his lawyer during the week of December 19, 2012. (Order (Doc. 137) at 10.)

27
28 ¹ Plaintiff's claim for injunctive relief is not mooted by his release from custody because
declaratory relief is available in cases where an injunction is inappropriate. (Order (Doc.
146) at 6.)

1 Plaintiff alleges that from January 13, 2013, to the 11th, he was confined at
2 University Medical Center, Tucson, and from the 11th to February 6, 2013, he was confined
3 at St. Joseph Hospital, in Phoenix. During these hospitalizations, officers guarding him
4 denied his requests for outgoing and incoming mail and for private attorney telephone calls,
5 and that these officers were acting pursuant to a policy or custom. Ryan is the policy maker
6 for the ADC. Plaintiff alleges a Sixth Amendment violation based on “the ADC’s lack of
7 a policy governing access to counsel for hospitalized prisoners or, alternatively, it is based
8 on a policy or custom that denies hospitalized prisoners access to attorneys.” (Order (Doc.
9 146) (summarizing Order (Doc. 137) at 15-17.) And, even if ADC’s general policy DO
10 902 applies, Defendants violated the Sixth Amendment by denying Larsgard any private
11 telephone calls with his attorney, denying him access to incoming and outgoing mail and
12 access to writing materials. The Court found a material factual dispute exists: “whether,
13 during his entire five-week hospitalization, Larsgard was denied the opportunity to
14 privately confer with his attorney either by telephone, mail, or personal visits.” (Order
15 (Doc. 137) at 16.)

16 Plaintiff’s claims arise under the Sixth Amendment because during this time he was
17 proceeding on direct appeal to challenge his 2012 conviction; his appeal was denied on
18 May 7, 2013. “The Sixth Amendment guarantees a criminal defendant the right to counsel,
19 and this right extends to the first appeal of right.” *Id.* at 7. “[T]he right to counsel includes
20 a right to confidential communication between a defendant and his attorney.” *Id.* A plaintiff
21 may bring a civil claim for violations of the Sixth Amendment, as distinct from asserting
22 Sixth Amendment violations as grounds for reversing a conviction. (Order (Doc. 137) at
23 7-18 (quoting *Nordstrom v. Ryan*, 762 F.3d 903, 911 (9th Cir. 2014) (harm in civil Sixth
24 Amendment case “‘is not that tainted evidence was used against him but that his right to
25 privately confer with counsel has been chilled.’”)) Here, Plaintiff brings such a civil claim
26 seeking compensatory and punitive damages and injunctive/declaratory relief.

27 Normally, the Eleventh Amendment would preclude compensatory damages against
28 Defendant Ryan because the Eleventh Amendment “bars suits for money damages in

1 federal court against a state, its agencies, and state officials acting in their official
2 capacities.” (Order (Doc. 146) at 3 (citing *Aholelei v. Dept of Public Safety*, 488 F. 3d
3 1144, 1147 (9th Cir. 2007)). On May, 17, 2018, this Court found that Eleventh Amendment
4 immunity was waived in this case. (Order (Doc. 146) at 3-5.) Accordingly, compensatory
5 damages against Defendant Ryan are not precluded in this case under the Eleventh
6 Amendment.

7 By cross-motions in limine the parties ask the Court to grant or deny Plaintiff leave
8 to seek punitive damages at trial. (P’s Motion (Doc. 159); D’s Motion (Doc. 178)).
9 Defendants also ask the Court to limit Plaintiff’s claim to nominal damages. (D’s Motion
10 in Limine Re: Damages. (Doc. 161.))²

11 The Defendants ask the Court to preclude any introduction of evidence at trial
12 alluding to an entitlement to or a measurement of damages other than nominal damages.
13 Defendants assert that compensatory damages based on Larsgard having lost his appeal are
14 barred by this Court’s earlier rulings and *Heck v. Humphrey*, 512 U.S. 477 (1994).
15 Defendants also submit that compensatory damages cannot be asserted now because
16 Plaintiff failed to produce any evidence of actual injury as required for an award of
17 compensatory damages. (Motion (Doc. 161) at 2 (citing *Lewis v. Casey*, 518 U.S. 343, 349
18 (1996)). This Court has already rejected the Defendants’ last argument. (Order (Doc. 47)
19 at 3-5 (clarifying access-to-courts claim in *Lewis* required actual injury for standing but in
20 a civil Sixth Amendment case, under *Nordstrom*, the harm is the constitutional injury: the

21 ²² Related motions are as follows: Ds’ Supplemental Response to Plaintiff’s Motion Re:
22 Punitive Damages (Doc. 163) (presenting new evidence of Director’s Instruction #371);
23 Plaintiff’s Motion to Strike Supplemental Response (Doc. 165); Defendants’ Response to
24 Motion to Strike (Doc.168) (arguing for summary judgment based on DI#371). By way of
25 Supplemental Response, Defendants’ submit a copy of Director Ryan’s Instruction # 371
26 (DI #371), recently adopted since Plaintiff filed the Motion in Limine Re: Punitive
27 Damages. The new directive from Ryan addresses Plaintiff’s charge that Defendants acted
28 with reckless or callous indifference to his right of access to counsel because they failed
to, and continue to not, take “any corrective action to ensure a person’s right to counsel
isn’t impeded.” (P’s Motion in Limine Re: Punitive Damages (Doc. 159) at 2. As
explained herein, the Court precludes punitive damages against Defendant Ryan, sued in
his official capacity. To the extent, Defendants ask the Court to enter judgment as a matter
of law for them based on DI #371, the motion for summary judgment, (Response (Doc.
168) is denied. *See also* (Order (Doc. 146) at 7 ((discussing mootness in context of
injunctive versus declaratory relief and finding that even if policy or custom changed, it
would remain to be determined whether declaratory relief would be appropriate)

1 right to privately confer with counsel has been chilled). Defendants are correct that
2 compensatory damages cannot be based on Larsgard having lost his appeal. *See* (Order
3 (Doc. 47) (clarifying Plaintiff brings a civil claim with alleged injury being “chilling” of
4 constitutional right to counsel as distinct from challenging legitimacy of criminal
5 conviction, precluding argument by Defendant that Plaintiff’s claim is barred by *Heck*).

6 Compensatory damages must be grounded on determinations of a plaintiff’s actual
7 losses. *Memphis Community School District v. Stachura*, 477 U.S. 299, 307 (1986). The
8 basic purpose of § 1983 is to compensate persons for injuries, i.e. losses, that are caused
9 by the constitutional injury, i.e., the deprivation of constitutional rights. *Id.* (citing *Cary v.*
10 *Piphus*, 435 U.S. 247, 254 (1978)). Patterned on principles derived from the common law
11 of torts where damages compensate for injury caused by a breach of duty, damages in a §
12 1983 case compensate a plaintiff for injuries caused by a constitutional violation. “To that
13 end, compensatory damages may include not only out-of-pocket loss and other monetary
14 harms, but also such injuries as ‘impairment of reputation . . . , personal humiliation, and
15 mental anguish and suffering.’” *Id.* (citations omitted). So for example, Plaintiff must
16 present evidence of actual injuries, i.e. actual damages, with some specificity. *Silver Sage*
17 *Partners Ltd. V. City of Desert Hot Springs*, 251 F.3d 814, 824 (9th Cir. 2001) (while
18 compensatory damages need not be determined with certainty, they may not be based on
19 mere speculation). To be clear, “damages based on the abstract ‘value’ or ‘importance’ of
20 constitutional rights are not a permissible element of compensatory damages”—such
21 damages would be too uncertain. *Stachura*, 477 U.S. at 310.

22 Here, Plaintiff asserts he and/or his criminal attorney can testify that he incurred
23 legal fees above and beyond fees he would have incurred in the appeal, if his attorney had
24 not had to spend time trying to find out where the Plaintiff was being detained and trying
25 to attain access to the Plaintiff when he was hospitalized to communicate with him during
26 the pendency of his direct appeal. (Response (Doc. 162) at 2.) Such evidence would reflect
27 out-of-pocket losses caused by the alleged constitutional violation. Plaintiff may present
28 this type of evidence to prove compensatory damages.

1 Even where the constitutional violation produces no “actual damages,” nominal
2 damages are available. (Order (Doc. 147) at 7 (citing *United States v. Marolf*, 173 F.3d
3 1213, 1219 (9th Cir. 1999)); *see also* Ninth Circuit Model Jury Instruction 5.6, Comment
4 (“[] nominal damages ‘must be awarded in cases in which the plaintiff is not entitled to
5 compensatory damages, such as cases in which no actual injury is incurred or can be
6 proven. [*Hazle v. Crofoot*, 727 F3d 983, 991-92] n. 6 [(9th Cir. 2013)]”). Plaintiff’s claims
7 for compensatory and punitive damages “and other relief the Court deems just and proper”
8 are consistent with a claim for nominal damages. (Order (Doc. 146) at 2 n. 1.) Even though
9 not expressly requested, Plaintiff may seek nominal damages at trial-- he does not need to
10 amend the Second Amended Complaint to add a claim for nominal damages.

11 Plaintiff also seeks punitive damages. “The purposes of punitive damages are to
12 punish a defendant and to deter similar acts in the future. Punitive damages may not be
13 awarded to compensate a plaintiff.” Ninth Circuit Model Jury Instruction 5.5. Punitive
14 damages are not available in every case, and are not available against municipalities,
15 counties or other governmental entities, *City of Newport v. Fact Concerts, Inc.*, 453 U.S.
16 247, 259-71 (1981), but may be available against governmental employees acting in their
17 individual capacities, *id.* at 254. As with the common law, Congress precluded punitive
18 damages under 1983 against governmental entities because such an extension of public
19 liability might place unmanageable financial burdens on local governments, and innocent
20 taxpayers would be unfairly punished for the deeds of persons over whom they have no
21 knowledge or control. *Id.* at 265-66.

22 Plaintiff asserts he “has sued Defendants in their individual capacity.” (P’s Motion
23 in Limine (Doc. 159) at 2.) Plaintiff does sue Defendant Straub individually, but he sues
24 Defendant Ryan in his official capacity as the policy maker for the ADC. *See* (Screening
25 Order (Doc. 30) at 3 (calling for answer to charge that Defendants Ryan and Schroder were
26 responsible for a policy prohibiting attorney contact). When the Court ruled on Defendants’
27 dispositive motion, it granted summary judgment on all counts and for all Defendants,
28 except for “the Sixth Amendment claim against Straub related to Larsgard’s confinement

1 in the Mental Health Unit in December 2012, and the Sixth Amendment policy claim
2 against Ryan in his official capacity related to Larsgard's hospitalization in 2013." (Order
3 (Doc. 137) at 23.) It could not be clearer that the suit against Defendant Ryan is in his
4 official capacity. The Court described the nature of the suit against Ryan and Schroeder as
5 follows: Larsgard alleged "that officers guarding him at the hospital denied his requests for
6 outgoing and incoming mail and for private attorney calls; that these officers were acting
7 pursuant to a policy or custom; and that Ryan and Schroder were the official
8 policymakers." (Order (Doc. 137) at 12 (citing Second Amended Complaint (Doc. 28) 7,
9 21)). The Court construed the claims under *Monell v. Dep't of Soc. Servs. of the City of*
10 *New York*, 436 U.S. 658, 694 (1978); "thus, Defendants are sued in their official
11 capacities." (Order (Doc. 137) at 12.) The Court dismissed Defendant Schroeder from the
12 case because "bringing an official capacity claim against both is duplicative and
13 unnecessary." (Order (Doc. 137) at 13.) *See* (Order (Doc. 139) at 1 (suit "against Ryan in
14 his official capacity")); (Order (Doc. 150) at 1 (same)); (Order (Doc. 146) at 1 (same));
15 *see also* (Order (Doc. 146) at 2 (clarifying this is an official-capacity action challenging
16 entity's policy or custom) at 3-5 (finding 11th Amendment immunity, which bars recovery
17 against an agency, as waived)).

18 Plaintiff may not obtain punitive damages against Defendant Ryan because damages
19 may not be awarded for punitive purposes against a governmental entity and governmental
20 officials acting at the policy making level. Larsgard may seek punitive damages against
21 Defendant Straub, who is sued in his individual capacity, if the evidence at trial could
22 support a finding by the jury that Straub acted maliciously, oppressively, or in reckless
23 disregard of the Plaintiff's rights.

24 The violation alleged against Defendant Straub spans one week, when Plaintiff was
25 confined in ASPC-Tucson, Rincon Mental Health Unit, and Straub was assigned as
26 Larsgard's CO III. Larsgard alleges that during this week, Straub denied him a scheduled
27 attorney call, during a time period when he was denied incoming and outgoing mail and
28 denied access to writing materials. Hence, Straub's refusal to allow Plaintiff to call his

1 attorney denied Larsgard any means to communicate with his counsel during this week.
2 The Court has a hard time seeing how the evidentiary record could support an instruction
3 for punitive damages against Defendant Straub, but will reserve its ruling on this until the
4 time of trial.

5 Accordingly,

6 IT IS ORDERED that the Plaintiff's Motion in Limine Re: Punitive Damages (Doc.
7 159) is GRANTED IN PART as to Defendant Straub and DENIED IN PART as to
8 Defendant Ryan.

9 IT IS FURTHER ORDERED that the Defendants' Motion in Limine Re: Damages
10 (Doc. 161) is DENIED; the Plaintiff is not limited to seeking only nominal damages.

11 IT IS FURTHER ORDERED that the Defendants' Motion in Limine Re: Punitive
12 Damages (Doc. 178) is GRANTED: Plaintiff may not seek punitive damages against
13 Defendant Ryan, who is sued in his official capacity.

14 IT IS FURTHER ORDERED that the Plaintiff's Motion to Strike Supplemental
15 Response (Doc. 165) is DENIED.

16 IT IS FURTHER ORDERED that the Motion to Expedite (Doc. 167) is GRANTED;
17 the Court shall rule expeditiously subsequent to Plaintiff's filing the Response which is due
18 on February 19, 2019.

19 Dated this 19th day of February, 2019.

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Honorable David C. Bury
United States District Judge